Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

71-998

GUIDO ANTHONY PENOSI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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GUIDO ANTHONY PENOSI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Guido Anthony Penosi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 8, 1971.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is reprinted as Appendix "A" hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1971. A timely petition for rehearing was denied on January 8, 1972. The judgment of the Court of Appeals and the order denying rehearing are reprinted as Appendix "B", *infra*. The juridiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

1. Whether petitioner's conviction under Title 26, United States Code §7201, for felonious failure to file personal federal income tax returns, was proper, where concededly there was no proof of any affirmative positive acts to attempt to defeat or evade the tax, as required by this Court's holding in *Spies* v. *United States*, 317 U. S. 492 (1943).

2. Whether petitioner's conviction for failure to file personal federal income tax returns, both as felonies and as misdemeanors, under the expenditures theory, was proper, where there were no established figures showing the sources from which expenditures during the tax year in question were made; and whether the failure of the trial judge to instruct the jury as requested by petitioner on the elements of such offense was prejudiciously improper.

Statutes Involved

Title 26, United States Code

§7201. Attempt to evade or defeat tax

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution".

§7203. Willful failure to file return, supply information, or pay tax

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under au-

thority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such record, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

The Indictment

The indictment in this case contained eight counts, covering four tax years: 1964, 1965, 1966 and 1967.

Counts 1, 3, 5 and 7 alleged as misdemeanors petitioner's failure to file personal federal income tax returns for each of those years, in violation of Title 26, United States Code, Section 7203, with alleged gross income of the following amounts:

Count 1	1964	$12,774.63
" 3	1965	16,608.06
" 5	1966	22,401.85
" 7	1967	18,382.62

Counts 2, 4, 6 and 8 alleged the felonious evasion of personal federal income taxes for the same years, in violation of Title 26, United States Code §7201, but for the following amounts:

Count 2	1964	$ 7,855.70
" 4	1965	11,313.81
" 6	1966	17,096.70
" 8	1967	18,382.63

The difference in amounts alleged for the same tax years is apparently the difference between alleged "gross" income and "taxable" income allegedly received by petitioner for the same tax periods.

The Record

The record consists of the complete transcript of the trial and exhibits received in evidence, as well as the proceedings in the Court of Appeals.

The Facts

The case of the government was based mainly on stipulations of fact, although there was some testimony of various witnesses, by which it was established that there were various living expenditures by petitioner, his wife and members of his immediate family. There was no dispute about the amounts or the fact of these expenditures, nor was there any dispute about petitioner's failure to file personal income tax returns for the tax years in question.

However, the government did not offer any proof as to any established figures showing the sources from which these expenditures were made during the tax years, or the complete lack of such sources. Thus, the proof of the living expenditures for each of the tax years was completely irrelevant, as a matter of law, to the issues of petitioner's duty to file personal federal income tax returns for the tax years in question on the supposition that he gained taxable income.

Also, there was absolutely no showing of any acts of concealment or any other affirmative positive acts by petitioner constituting attempts by him to defeat or evade income taxes, or any other evidence of wilful evasion of income taxes for any of the tax years in question. The

government did not offer any proof of any such affirmative positive felonious tax evasion; it simply stated that it had no evidence to show petitioner's source of income or where or how he obtained the funds upon which he and his family subsisted.

The government did offer testimony by Internal Revenue Special Agent Dennis J. Jaster to the effect that he conducted an investigation of petitioner. In this investigation Jaster merely "contacted" (*sic*) banks and savings and loan associations in Dade, Broward and Palm Beach counties, in Florida, as well as brokerage houses in the Miami area, and he could not find any bank or brokerage accounts for petitioner. Jaster also had the land records in Bronx and New York Counties, in New York, as well as one credit information agency, checked, from which he learned nothing at all about petitioner's assets.

The record disclosed that petitioner and his family moved from New York state to Florida in 1964, the first tax year in question, and that petitioner bought a home, a car on time payments, and had other expenses, including sending his children to school.

From the meagre investigation conducted by Agent Jaster the government argued that petitioner and his family had effectually arrived in Florida in 1964 in a penniless condition, with no assets whatsoever, except a 1963 automobile purchased by his wife.

In its opinion affirming the judgment of conviction, the Court of Appeals held that Agent Jaster's investigation was sufficient to cast on petitioner the burden of coming forward with proof as to the source of his assets, or else assume "the risk that the jury would believe the government's witnesses and find him guilty", citing *Holland v. United States*, 348 U. S. 121, 138-139 (1954). (Opinion, Appendix A, pp. A6-A7, *infra*.)

However, in the same opinion the Court of Appeals did not refer to petitioner's conviction on the four felony counts or make any statement at all as to petitioner's argument that such conviction was in violation of this Court's holding in *Spies* v. *United States*, 317 U. S. 492 (1943).

Following petitioner's conviction on all counts, the district court sentenced him to a concurrent one-year term on the misdemeanor counts, and a forty-five month concurrent term on the felony count, the entire sentence to be served concurrently.

Petitioner's Requested Jury Instructions

Among his requested jury instructions, petitioner submitted the following to the District Judge:

> No. 9.
>
> *Proof of Tax Due—Net Worth Method—Starting Point*
>
> The prosecution has endeavored to prove, in this case, that the defendant did not have any assets at all, at the beginning of each taxable year, by tracing the financial history of the defendant. In this connection, you should bear in mind that evidence as to the defendant's financial histories in prior years may be considered by you only for such aid as these may give, in determining the taxable income for the years involved herein.
>
> If the jury should find that the evidence in the case does not establish the net worth of the defendant to a reasonable certainty as of the beginning of each taxable year, then the jury should acquit the accused.

On the other hand, if the evidence of the case does establish beyond a reasonable doubt, the maximum amount of the defendant's net worth as to the beginning of each taxable year, the jury should then proceed to determine whether the evidence in the case established beyond a reasonable doubt that the funds received represented taxable income on which the defendant wilfully attempted to evade or defeat the tax as charged in the indictment.

Fed. Jury Prac. & Instructions, 2nd Ed., Vol. 2, Sec. 52.09, paraphrased.

No. 10

Proof of Tax Due—Net Worth Method—Taxable Income

The burden is always upon the prosecution to establish beyond a reasonable doubt that any amounts reflected in the defendant's increased net worth, plus non-deductible expenditures, were from taxable, rather than non-taxable sources. In this connection, the jury will bear in mind that the Federal income tax is levied on income derived from compensation for personal services of every kind and in whatever form paid; also on income from interest, dividends, gains, profits, and the like.

The law provides, however, that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported as income. Such non-taxable funds or property include such items as gifts, inheritances, the proceeds of life insurance policies, loans, and certain other items not pertinent here.

Fed. Jury Prac. & Instructions, 2nd Ed., Vol. 2, Sec. 52.10.

No. 11

The Government has introduced evidence of specific expenditures by the defendant, Mr. Penosi, during the years involved herein, and the purpose of this evidence by the Government was to show that Mr. Penosi must have known that he had over $600 a year in gross income during the years involved.

The jury should not infer from this that the defendant had taxable income in excess of $600 in each of the years, or that he had to be aware that he had gross income in excess of $600, unless and until the government has proven beyond a reasonable doubt that the expenditures made were made out of taxable income and not from prior accumulations, gifts or loans.

Further, if the Government cannot establish a figure showing the source from which the expenditures were made during the year, or where there is a complete lack of such source, then you are to completely disregard any proof of expenditures made during the years herein, no matter how large they may be.

Marcus v. *United States*, 422 F. 2d 752 (5th Cir., 1970).

The trial court refused to give these instructions (T. R. 258-262). After the trial judge charged the jury, petitioner's counsel duly noted his exception to the court's failure to include these instructions in his charge (T. R. 326).

Reasons for Granting the Writ

This case involves the construction and interpretation of the federal criminal tax laws, and of the failure of the lower federal courts to follow this Court's rulings and criteria in the administration of such laws.

1. Petitioner's conviction under Title 26, United States Code §7201, for felonious failure to file personal federal income tax returns, was not proper, where concededly there was no proof adduced by the government of any affirmative positive acts on the part of petitioner to attempt to defeat or evade the tax, as required by this Court's holding in *Spies* v. *United States*, 317 U. S. 492 (1943).

The purpose of charging petitioner in two counts for each tax year covered by this indictment was to lay a basis for the imposition of severe penalties, far in excess of the maximum term of one year imprisonment authorized by 26 U.S.C. §7203. The basic charge in this case was the criminal failure to file income tax returns for the years 1964, 1965, 1966 and 1967 (Counts 1, 3, 5 and 7). These were clearly misdemeanor violations. However, by charging felony violations for the same years, in counts 2, 4, 6 and 8, in alleged violation of 26 U.S.C. §7201, the government enabled the trial court to impose a sentence of 45 months imprisonment.

It is clear from the evidence of record in this case that there was no proof of any act of concealment of income or any other affirmative positive act wilfully done in furtherance of the required criminal intent to defeat or evade the tax due. The government simply relied upon its evidence that there were no tax returns filed by petitioner for the tax years at issue, together with its negative assertion of a starting point showing of assets or net

worth, as it basis for contending that petitioner feloniously failed to file tax returns. It pointed to no affirmative acts of tax evasion in support of its case. The criteria established on this point in this Court's holding in *Spies* v. *United States*, *supra*, were not met.

It is the added element of affirmative positive acts of tax evasion, usually accomplished by the concealment of income, which distinguishes the misdemeanor counts from the felony counts; or, to put it in terms of the proposed jury instruction set forth in *Devitt* and *Blackmar*, *Federal Jury Practice and Instructions* (1970) §52.03, "some act willfully done in furtherance of such intent" (to evade or defeat the tax due), citing *Spies* v. *United States*, *supra*. Cf. *Berra* v. *United States*, 351 U. S. 131 (1956), on the lesser included offense doctrine.

To the extent that the district court and the court of appeals did not follow the *Spies* doctrine in this case, their rulings sustaining the validity of the felony counts were clearly erroneous. Moreover, the decision in this case is squarely in conflict with the decision of the Seventh Circuit in *United States* v. *Mesheski*, 286 F. 2d 345, 346 (7th Cir., 1961), where the court held that the mere failure to file a tax return cannot constitute a felony:

> "Neither defendant nor the government has cited any published case directly in point. The parties are agreed that mere failure to file a return and pay a tax does not constitute a wilful attempt to evade or defeat the tax. There must be something more, some affirmative positive act to attempt to defeat or evade the tax. *Spies* v. *United States*, 1943, 317 U. S. 492, 500, 63 S. Ct. 364, 87 L. Ed. 418; *United States* v. *Bardin*, 7 Cir., 1955, 224 F. 2d 255, 260; *Bridgeforth* v. *United States*, 6 Cir., 1956, 233 F. 2d 451, 453."

2. Petitioner's conviction for failure to file personal federal income tax returns, both as felonies and as misdemeanors, under the expenditures theory, was not proper, since there were no established figures showing the sources from which expenditures during the tax year in question were made; and the failure of the trial judge to instruct the jury as requested by petitioner on the elements of such offense was prejudiciously improper.

In both the district court and the court of appeals, petitioner urged that this case was controlled by the decision of the Fifth Circuit in *Marcus* v. *United States*, 422 F. 2d 252 (5th Cir., 1970). Two of the three members of the panel deciding *Marcus*, which reversed an expenditures theory case for legal insufficiency, were members of the panel deciding this case, including Judge Morgan, the author of both opinions. Nevertheless the court of appeals held that the investigation of Agent Jaster to be legally sufficient to send this case to the jury. Petitioner contends that the case was not so legally sufficient and did not follow the criteria established, for net worth cases by this Court in *Holland* v. *United States, supra.*

The criteria of establishing that a defendant in a criminal tax case has taxable income should not depend upon the sufficiency of the investigation of that defendant by the investigating agent. Here the purported investigation was woefully insufficient, as shown by the testimony of the agent. There was no starting point of established figures from which expenditures could be taken to mean income for tax purposes. The failure of the defendant to produce evidence of the source of his assets and funds expended for subsistence is treated as proof of failure to report taxable income. This constitutes shifting the burden of proof to him, in spite of the self-incrimination clause of the Fifth Amendment to the Constitution, requiring him to refute the allegation that his expenditures

necessarily came from taxable income earned during the tax year in question.

In light of this state of the proof, petitioner's trial counsel requested the trial judge to instruct the jury on the elements of the offenses charged, as set forth in Requests Numbers 9, 10 and 11, reprinted, *supra*, at pp. 6-8. The failure of the trial judge to give these requested instructions was noted and exception taken thereto. Such failure to instruct too was clearly erroneous and in violation of this Court's criteria established in such cases as *Holland* v. *United States*, *supra*, and as followed in *Taglianetti* v. *United States*, 398 F. 2d 558 (1st Cir., 1968), affirmed 394 U.S. 316 (1969).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG,
Counsel for Petitioner.

February 2, 1972

APPENDIX A

Opinion of United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 31,151

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUIDO ANTHONY PENOSI,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(December 8, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

MORGAN, Circuit Judge: Guido Anthony Penosi appeals his conviction for failure to file personal income tax returns and for wilful tax evasion. After considering all the assignments of error, we affirm the conviction.

Penosi was charged in an eight-count indictment with tax violations in the years 1964, 1965, 1966 and 1967. Four counts of the indictment alleged failure to file tax

returns for each of these years in violation of 26 U.S.C. §7203,[1] and the other four counts charged wilful evasion of income tax for the same years in violation of 26 U.S.C. §7201.[2] At the trial before a jury, the government introduced undisputed evidence that Penosi enjoyed income which, if derived from taxable sources, would be subject to taxation as follows:

	Taxable Income	*Tax Due*
1964	$ 7,853.70	$1,450.74
1965	11,313.81	2,109.04
1966	17,096.70	3,567.08
1967	18,382.63	2,562.95

Using the expenditure method of proof the government established these figures by presenting real and testimonial evidence of Penosi's cash disbursements during the years in

[1] Section 7203 of Title 26, U.S.C.:

"Any person required under this title to pay any estimated tax or taxes, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or taxes, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

[2] Section 7201 of Title 26, U.S.C.:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

question and then subtracting any expenditures made out of accumulated funds or non-taxable sources.

In support of its assertion that Penosi's income derived from taxable rather than non-taxable sources, the government called Agent Dennis J. Jaster to the witness stand. Jaster testified that in his capacity as special agent for the Internal Revenue Service he conducted an intensive investigation in an effort to determine the source of Penosi's expenditures. The investigation covered all banks, brokerage houses, and relevant court records in the immediate area of Penosi's present home in Miami Beach, Florida, and in New York City where Penosi had resided previously. Agent Jaster also contacted credit bureaus and various friends and relatives of Penosi. However, in every instance the investigation failed to reveal any sizable assets held by Penosi prior to the 1964 tax year or any other non-taxable sources of income such as loans, gifts, bequests, etc. In fact, no one contacted by Jaster, including Penosi's relatives, was able to state exactly what Penosi did for a living.

At the close of the government's case Penosi presented no evidence but argued to the jury that the government failed to meet its burden of proving that the expenditures came from taxable income. The jury disagreed and returned a verdict of guilty on all eight counts. The district judge then imposed a sentence totalling three years and nine months.

On appeal Penosi contends that under this court's decision in *Marcus* v. *United States*, 5 Cir. 1970, 422 F. 2d 752, the government is required to pinpoint a taxable source of income in order to sustain a conviction for tax evasion. Appellant's interpretation of *Marcus* is misplaced. In that case we held that the government did not

prove its case by showing only that the defendant had yearly expenditures in excess of $600.00. In addition, we held the government must establish, either directly or inferentially, that the expenditures were made from a taxable source of income.

Proof of a taxable source may take several different forms according to the nature of the defendant's financial activities. The most obvious method of proving a taxable source would be to present evidence of the precise origin of the income, for example, a cancelled check by which a certain employer paid a defendant for services rendered.

However, when such evidence is not available, the government must resort to other methods of proof. In this type of case the government has to establish at the outset what was not shown in *Marcus* v. *United States*, *supra*, that is, the defendant's net worth at the beginning of the time period in which he allegedly failed to file a tax return. Requiring the government to show an opening net worth is simply a requirement that the government prove to a reasonable certainty that the income expended did not spring from prior accumulations or earnings for which the defendant would not be liable in taxes.

Next, the government has the burden of proving that the expenditures did not come from other non-taxable sources such as gifts, loans, bequests, or favorable law suit verdicts. Since this is actually a burden to negate certain possible facts, the government may meet the burden by producing evidence of an investigation which uncovered no sources of non-taxable income. Again, in *Marcus* v. *United States*, *supra*, there was no investigation showing that the expenditures were not made from tax exempt funds.

Thus, in cases where direct evidence of taxable sources is lacking, the government must negate the sources of non-taxable income by establishing an opening net worth and then showing, by investigation or otherwise, an absence of additional non-taxable sources. In this manner the government carries its burden of presenting evidence from which the trier of fact might reasonably conclude to the exclusion of all other reasonable hypotheses that the expenditures came from taxable sources.[a] The decision in *Marcus* v. *United States*, *supra*, applied this test and properly reversed the conviction for the reason that the government failed to negate non-taxable sources:

> "If there is no established figure showing the source from which expenditures during the year can be made, *or the complete lack of such source* then there is no relevance to proof of expenditures during the year, no matter how large they may be." (Emphasis supplied.) 422 F.2d at 755.
>
> Quoting from *Dupree* v. *United States*, 5 Cir. 1955, 218 F.2d 781.

In conclusion then, the requirement that the government establish a taxable source does not mean, as appellant argues, that the exact origin of the expenditures must be put into evidence and proved beyond a reasonable doubt. The requirement means only that the government must prove that the expenditures did not come from tax exempt sources.

---

[a] This Circuit's standard for testing the sufficiency of circumstantial evidence has been well-delineated. See, *e.g.*, Vick v. United States, 5 Cir. 1964, 216 F.2d 228; Davis v. United States, 5 Cir. 1971, ——— F.2d ——— No. 29779, June 9, 1971 and United States v. Willoz, 5 Cir. 1971, ——— F.2d ——— No. 28642 & 30037, October 19, 1971.

Turning to the case at hand, we find that the government met its burden of proof by establishing the very two elements which were not established in *Marcus* v. *United States*, *supra*. Agent Jaster testified that he found Penosi's opening net worth to consist of but one mortgaged automobile, and that he discovered no other sources of non-taxable income. Applying the standards outlined above, this was all the government was required to prove to sustain the jury's verdict.

Penosi's next contention is that the evidence was insufficient to support his conviction because the investigation was not thorough enough to rule out all the non-taxable sources of income that Penosi might have in places other than the Miami Beach and New York City areas. We find no merit in this argument. Once expenditures are established, the government cannot be expected to conduct an exhaustive nation-wide investigation when the defendant supplies no relevant leads as to where he got the money he admittedly spent. See *Holland* v. *United States*, 1954, 348 U.S. 121. Under the circumstances of this case, the government agent did enough to carry the burden of proof when he interviewed friends and relatives and checked with financial and governmental institutions at both the present and former residences of the defendant.

Nothing we have said is meant to imply that Penosi had the burden to supply information to the government or to testify in court concerning the source of his expenditures. The burden of proving a taxable source remained on the government throughout the trial. But when the results of the investigation were put into evidence, the government established a *prima facie* case, and by remaining silent, Penosi took the risk that the jury would believe the government's witnesses and find him guilty. As the

Supreme Court stated in *Holland* v. *United States*, *supra* the defendant who remains silent in a prosecution for tax evasion often does so "at his peril":

> "But where relevant leads are not forthcoming the government is not required to negate every possible source of non-taxable income, a matter peculiarly within the knowledge of the defendant. . . .
>
> "Nor does this rule shift the burden of proof. The government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the government has established its case, the defendant remains quiet at his peril." 348 U.S. at 138, 139.[4]

We have carefully considered each of appellant's other contentions and find them without merit.

The judgment of the district court is therefore in all respects AFFIRMED.

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[4] In *Holland*, the government was able to demonstrate a likely source of taxable income which was not shown in the case at bar. However, four years after *Holland*, the Supreme Court granted certiorari in United States v. Massei, 1958, 355 U.S. 595, to state in a brief *per curiam* that it had not meant to imply that proof of a likely source was a necessity in such cases. If the trier of fact finds guilt, the test on appellate review turns upon the sufficiency of the evidence under the circumstantial evidence test. (See footnote 3.)

APPENDIX B

Judgment of United States Court of Appeals for the Fifth Circuit and Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 31151

D. C. Docket No. 70-212-CR-EC

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

GUIDO ANTHONY PENOSI,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 8, 1971

Issued as Mandate:

Appendix B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 31,151

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GUIDO ANTHONY PENOSI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(January 7, 1972)

ON PETITION FOR REHEARING

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

Per Curiam:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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MICHAEL RODAK, JR., CLERK

No. 71-998

In the Supreme Court of the United States

OCTOBER TERM, 1971

GUIDO ANTHONY PENOSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 452 F. 2d 217.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. B1) was entered on December 8, 1971; and a petition for rehearing was denied on January 7, 1972 (Pet. App. B, p. B2). The petition for a writ of

certiorari was filed on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether sufficient evidence supports petitioner's conviction of willfully attempting to evade or defeat his income taxes.

2. Whether the trial judge erred in refusing to give certain jury instructions.

STATUTES INVOLVED

Sections 7201 and 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 2-3.

STATEMENT

Petitioner was charged and convicted under an eight-count indictment of failing to file income tax returns and of attempting to evade and defeat his income taxes for each of the years 1964 through 1967, in violation of 26 U.S.C. 7201 and 7203, and was sentenced to concurrent prison terms, the longest of which was forty-five months. The court of appeals affirmed (Pet. App. A).

The pertinent facts are not disputed and are set forth fully in the court of appeals' comprehensive opinion (Pet. App. A, pp. A1-A3). The government used the "expenditures less funds available" method of proof to show that in the years in question petitioner, though he did not file any tax returns, had

taxable income and unpaid taxes as follows (Pet. App. A, p. A2):

Year	Taxable Income	Tax Due
1964	$ 7,853.70	$1,450.74
1965	11,313.81	2,109.04
1966	17,096.70	3,567.08
1967	18,382.63	2,562.95

An Internal Revenue Agent testified, in support of the government's assertion that petitioner's income came from taxable sources, that he had conducted a careful investigation covering financial institutions, courts of record, relatives and friends both in the Miami Beach, Florida, area, where petitioner then resided, and in New York City where petitioner had lived previously (R. 91, 97-98; 209-223).[1] This investigation indicated that on December 31, 1963, petitioner had no sizable assets or other non-taxable sources of income (R. 119, 209-223). During the four years in question (1964-1967), however, petitioner's expenditures, in the form of currency and money orders, exceeded $76,000 (R. 220, 235). The agent indicated that neither petitioner nor his relatives and associates gave him any explanation concerning the source of the funds that petitioner spent or the nature of his livelihood (R. 91, 97-98, 209-223).

At trial petitioner presented no evidence. Instead, he argued that the prosecution had failed to meet its burden of demonstrating that the expenditures

[1] "R." references are to the separately bound record appendix filed in the court of appeals.

came from taxable income. The jury disagreed and returned a guilty verdict on each count. (Pet. App. A, p. A3.)

As regards the government's method of proof, the district judge instructed the jury that "the Government must further prove beyond a reasonable doubt that the defendant had no accumulation of funds at the beginning of the taxable year from which to secure and pay out such sums," and that the jury should infer nothing from the expenditures shown "unless and until the Government has proven, if it did prove, beyond a reasonable doubt that the expenditures made were made out of taxable income and not from prior income, accumulations, gifts or loans, or sources which were nontaxable income" (R. 320, 321.) Petitioner requested different instructions, and objected both before and after the jury charge to the judge's refusal to use his instructions (R. 326).

ARGUMENT

The decision below is correct, and there is no conflict of decisions or other ground for further review.

1. Petitioner claims (Pet. 9) that "there was no proof adduced by the government of any affirmative positive acts on the part of petitioner to attempt to defeat or evade the tax," and that accordingly his conviction of the felony charges under 26 U.S.C. 7201 is not supported by sufficient evidence under the teaching of *Spies* v. *United States*, 317 U.S. 492. As the Court pointed out in *Spies*, however, an "affirma-

tive willful attempt may be inferred from conduct such as * * * covering up sources of income, [and] handling of one's affairs to avoid making the records usual in transactions of the kind * * *" (317 U.S. at 499). The circumstances of the present case fit this category. Petitioner not only failed to file any tax returns but also would not disclose to the agent the sources of the funds he spent. He arranged his financial affairs so that there were no books, records, checks, bank accounts or credit cards, dealt in cash for the most part (R. 219-222), and even used a name other than his own in signing an apartment lease (R. 175-176).

This case is quite different from *United States* v. *Mesheski*, 286 F. 2d 345 (C.A. 7), which petitioner characterizes as "squarely in conflict" with the decision below (Pet. 10). The court in *Mesheski*, on the particular facts there, found that the government had not shown sufficient affirmative conduct by the taxpayer. The government's proof in this case, as detailed above, was substantially stronger.

There was also ample evidence from which the jury could infer that the funds petitioner spent came from taxable sources. The "expenditures less funds available" method of proof has been judicially approved (*Holland* v. *United States*, 348 U.S. 121; *Tagliaretti* v. *United States*, 398 F. 2d 558 (C.A. 1), affirmed *per curiam*, 394 U.S. 316), and can be used to establish current income where, as in this case, it is shown (R. 209-233) that there were no prior accumulations or other nontaxable sources from which

the funds spent likely would have come.[2] See *United States* v. *Massei*, 355 U.S. 595. As the court below noted, petitioner's interpretation of and reliance on *Marcus* v. *United States*, 422 F. 2d 752 (C.A. 5), is mistaken, since here, unlike the situation in *Marcus*, the government's proof negated prior accumulations or nontaxable sources (Pet. App. A, pp. A3-A6).

2. The instructions to the jury embraced all the elements of the expenditures method of proof. The jury was repeatedly told that the government must show that the expenditures came from taxable rather than nontaxable sources, and illustrations of nontaxable sources (such as gifts, inheritances, and the like) were listed (R. 317, 321). The instructions also stated that "the Government must further prove beyond a reasonable doubt that the defendant had no accumulation of funds at the beginning of the taxable year from which to secure and pay out such sums" (R. 320). The trial judge admonished that nothing should be inferred from the expenditures shown "unless and until the Government has proven, if it did prove, beyond a reasonable doubt that the expenditures made were made out of taxable income and not from prior income, accumulations, gifts or loans, or sources which were nontaxable income" (R. 321).

Petitioner did not object to the instructions as given before the jury began deliberations, and thus waived

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[2] The government's computation credited petitioner with nontaxable items, such as Blue Cross refunds and automobile resale proceeds (R. 236).

the claims which he seeks now to raise. See Rule 30, Fed. R. Crim. P.; 2 Wright, *Federal Practice and Procedure*, Sec. 484; see also *Thompson* v. *United States*, 272 F. 2d 919, 922 (C.A. 5). In any event, the trial judge properly declined to give petitioner's requested instructions (Pet. 6-8). Those instructions were in fact used so far as they correctly stated the facts and the law applicable to the present case and as modified to reflect that the government was using an expenditures, rather than a net worth, method of proof.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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